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# Supreme Court of the United States

OCTOBER TERM, 1959

NO. 244

FRANCIS M. ELMORE, *Petitioner*

*versus*

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated May 28, 1959, and entered on the same date.

## OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed in the Appendix hereto

(App. 20). There was no opinion in the District Court however the proceedings in the District Court on petitioner's motion for new trial may be found beginning on page 381 of the Appendix to the Brief of the Appellant (Petitioner) filed in the Court of Appeals below.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1959. No petition for rehearing was filed. The jurisdiction of this Court is involved under 28 U. S. C., 1254(1) and Rule 22(2). On June 27, 1959 Chief Justice Earl Warren signed an order extending the time to petition for a writ to and including July 27, 1959.

## STATUTE INVOLVED

15 U. S. C. 714 m(a).—Whoever makes any statement knowing it to be false, or whoever wilfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

15 U. S. C. 714 m(c).—Whoever shall wilfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not

more than $10,000 or by imprisonment for not more than five years or both.

15 U. S. C. m(d)—Whoever conspires with another to accomplish any of the acts made unlawful by the preceding provisions of this section shall, upon conviction thereof, be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for doing such unlawful acts.

## QUESTIONS PRESENTED

1. Can there be a conversion of fungible grain prior to a demand for delivery where there is no criminal intent or no substantial evidence to support a conviction?

2. Does 15 U. S. C. 714m(a) make it a crime to promise to do something in the future?

3. Can a person be convicted under 15 U. S. C. 714m(d) for conspiracy to violate 15 U. S. C. 714m(a) where the statement relates to promises about a future act or no violation of 15 U. S. C. 714m(a) is proved?

4. On the issue of criminal intent to convert fungible grain is the jury entitled to consider the return of the grain, long before demand or any fact disclosing its use comes to light?

5. Is it error to charge that a person may be guilty of conversion of fungible grain without intent, where he had lawful possession and his lawful possession is undisputed.

6. Can there be a conviction under 15 U. S. C. 714 m(a) where the evidence shows that the statement is true or if not technically true is substantially true.

## STATEMENT

Petitioner was tried in the Florence Division of the United States District Court for the Eastern District of South Carolina on March 3-7, 1958 on 30 counts for violation of 15 U. S. C. 714m(a), 15 U. S. C. 714m(c) and 15 U. S. C. 714m(d).

Counts 1 through 11 (R. 1-6) charged Petitioner with making false statements and representations on Farmer's Purchase Orders for grain for livestock feed issued pursuant to Authority of 15 U. S. C. 714, 42 U. S. C. 1855-1855(g), 12 U. S. C. 1148a-2(d) and 7 U. S. C. 1427, when he certified that he had sold and delivered grain to certain farmers in certain amounts on certain days set forth in the various counts, all in violation of 15 U. S. C. 714m(a).

Counts 12-28 (R. 7-15) charged that Petitioner did wilfully steal, remove, dispose of and convert to his own use or to that of another, property owned or pledged to Commodity Credit Corporation which was stored in the warehouse of Eastern Carolina Farmers Cooperative Association at Florence, S. C., when he caused certain grain, the amounts and dates of shipment being set out in the various counts, to be shipped out of the warehouse, all in violation of 15 U. S. C. 714m(c).

Counts 31 (R. 16) charged that Petitioner made a false statement knowing the same to be false, for the purpose of obtaining 4200 bushels of wheat at a discount when he submitted a feed certificate to Commodity Credit Corporation certifying that said wheat would be used for livestock feed, or, if subsequently sold, a certificate would be obtained from

buyers to the same affect, all in violation of 15 U. S. C. 714m(a).

Count 32 (R. 16) charged that Petitioner, from May 1, 1954 to the date of the indictment, conspired with Thomas H. Elmore to violate 15 U. S. C. 714m(a) by making statements, known to be false, that certain grain would not be used for livestock feed in order to influence Commodity Credit Corporation, to obtain grain in violation of 15 U. S. C. 714m(d).

Petitioner was found guilty on Counts 1, 2, 6, 7, 9, 11, 12 through 28, 31 and 32 (R. 380). Petitioner moved for a directed verdict of acquittal on County 12 through 28 (R. 349), 31 and 32 (R. 339) and took exception to the Court's failure to charge petitioner's request 1 and 2 (R. 370) and for the Court's refusal to charge that the jury could consider the return of the grain on the question of intent (R. 371).

Petitioner also moved for a New Trial for the failure of the Court to direct a verdict on County 31 (R. 403); that the verdict was contrary to the weight of the evidence and not supported by substantial evidence; that the Court erred in failing to direct a verdict for Petitioner on Counts 12 through 28 for failure to charge petitioner's request to charge; for error in the Court's charge on what constituted conversion and the Court's failure to chrage that the jury could consider the return of the grain on the question of guilt or innocence; that the Court failed to direct a verdict on Count 32, and that the verdict on County 32 was contrary to the weight of the evidence and not supported by substantial evidence.

Petitioner's present counsel did not represent petitioner in the Trial Court. Although no motion was

made in the Trial Court for a directed verdict on Counts 1 through 11, petitioner sought to raise this issue on Appeal and the Court below considered this issue (App. 37).

Petitioner was manager of Eastern Carolina Farmers Co-operative Association and a partner and manager of Elmore Milling Co. In 1954, a severe drought occurred in South Carolina and it was declared to be a disaster area. The livestock farmers became entitled to receive aid in securing feed for their livestock. Petitioner, as manager of Elmore Milling Company, and as an accomodation to livestock growers, assisted farmers in securing grain. Farmers secured Farmers Purchase Orders (R. 166) for certain amounts of feed according to their needs from Farmers Home Administration. Certain farmers presented Purchase Orders to Petitioner who signed them certifying that he had sold so much straight grain or mixed feed to each. The farmers verified this and petitioner received dealers certificates from the Agriculture Stabilization and Conservation Office which he negotiated for cash. The certificates had blanks to be filled in according to whether Petitioner sold straight grain or mixed feed. If he sold straight grain he filled in one column, if he sold mixed feed containing at least 75 per cent straight grain, he filled in another column and if he sold mixed feed containing at least 60 per cent in straight grain he filled in still another column. There was no column to be filled in if Petitioner sold the amount of straight grain called for in the order and mixed it into feed. Therefore, either petitioner or the Government would get short changed. Petitioner therefore, filled in the column for the amount of straight grain sold although he mixed it into feed.

Petitioner was found guilty on Counts 1, 2, 6, 7, 9 and 11 for his actions.

In 1953 and 1954, Eastern Carolina signed storage agreements with C. C. C. (R. 83). Eastern Carolina was to store grain and ship it on order of C. C. C. If the grain shipped on the order did not conform to grade, Eastern Carolina was to pay for it. During the early part of 1954 when grain was coming in petitioner as manager of Eastern Carolina purchased grain and caused it to be sold. He also sold other grain in the warehouse, without warehouse receipts, which was pledged to C. C. C. These shipments were made between May 25, 1954 and June 22, 1954, (Counts 12 through 28). Petitioner instructed the bookkeeper to keep track of all shipments made. Beginning on June 17, 1954, petitioner caused grain to be shipped into Eastern Carolina to replace C. C. C. grain which had been shipped out. (R. 109, 111). All the grain shipped out was replaced (R. 117). During this period Eastern Carolina was also shipping grain on order of C. C. C.

The grain which petitioner caused to be shipped into Eastern Carolina to replace C. C. C. grain was purchased from C. C. C.

On July 12, 1954, Petitioner purchased grain from the Calhoun County Agriculture Stabilization and Conservation Office and signed a statement without reading it that it would be used for Livestock feed or petitioner would pay a penalty of 10c per bushel if he permitted the grain to enter trade channels as human food, or, if he sold it, he would obtain a similar certificate from the buyer. The grain so purchased by petitioner was put into Eastern Carolina to re-

place grain of C. C. C., which he caused to be shipped out.

Petitioner had a brother, Thomas H. Elmore, who was also indicted along with petitioner but who did not appeal as he was placed on probation. Thomas H. Elmore worked for a grain trucking concern and he signed a certificate for the purchase of some C. C. C. grain from Darlington County.

The Court of Appeals affirmed petitioner's conviction on all counts holding that the errors in the Trial Court's Charge were only technical and not prejudicial to petitioner's cause. That where there is a contractual right to commingle fungible goods no demand is necessary to support a conviction of conversion, that a person can be guilty of criminal conversion even though he has a contractual right to use the grain (which petitioner did not have) that 15 U. S. C. 714m(a) embraces false and fraudulent promises which the maker does not intend to perform and that the evidence was sufficient to present issues of fact for the jury.

## REASONS FOR GRANTING THE WRIT

### I

### The Court Below Has Decided Questions of Federal Law of Enormous Practical Importance Which Have Not Been, But Should Be, Settled by This Court.

The activities of the Commodity Credit Corporation are tremendous, involving millions of persons and billions of dollars. As a matter of fact, the economy of our nation is closely tied to and, to a certain extent, controlled by C. C. C. Practically all of the legislation

enacted by Congress dealing with farm supports and subsidies are carried out by the C. C. C. The problem of farm surpluses, their storage and disposition, is one of first magnitude and most troublesome to our government. C. C. C. stores grain in practically every county in this country and thousands of persons are directly involved and concerned with the physical storage of the huge existing grain surplus which show no signs of improvement.

15 U. S. C. 714m(a), 15 U. S. C. 714m(c), and 15 U. S. C. 714m(d), are the primary criminal statutes under which the government seeks to enforce the many laws, rules and regulations controlling the storage of grain by C.C.C. yet these sections have never been before this Court for interpretation, at least insofar as petitioner has been able to discover. According to petitioner's research, there have been only four other criminal cases involving the issue of conversion of grain which have reached the appellate courts: *Dawson v. United States*, 5 Cir. 203 F. (2d) 201; *Shannon v. United States*, 5 Cir. 209 F. (2d) 835; *Henderson v. United States*, 5 Cir. 302 F. (2d) 81; and *Marteney v. United States*, 10 Cir. 218 F. (2d) 258.

There is no way of telling the number of persons who have been tried and whose rights have been decided under these criminal statutes, all without guidance from this Court. It seems fitting therefore that this Court should take the opportunity presented in the present case to look into this case by way of a writ of certiorari and settle the important questions of Federal law under these criminal statutes which have not been decided by this Court but which should be settled by this Court, particularly if these reported case are to be cited as authority to support a conviction under

the facts of the present case. In all of the above cases, except one, there was a demand and in the one no demand was necessary because there was no grain.

II

**The Decision Below Is In Direct Conflict With the Decision of the Court of Appeals for the Tenth Circuit in *Hartford Accident Ind. Co., v. State of Kansas*, 247 Fed. (2d) 315.**

In *Hartford*, which was an action by the State of Kansas, representing grain depositors, against the Indemnity Co., on a defaulting warehouseman's bond, the Tenth Circuit, per Judge Huxman, held that there must be a demand before there can be a conversion. The Indemnity Company's bond apparently did not cover conversions and the company contended that there had been a conversion. The C. C. C. was a party to the suit and there took a position contrary to the one the government takes in the present case.

In the present case, the Fourth Circuit, per Judge Soper, held that petitioner was guilty of conversion even though no demand was made for the grain. Judge Soper distinguished *Hartford* by saying that *Hartford* was concerned with contractual obligations owed by the custodian to the owner of the wheat and that when Judge Huxman said that there can be no conversion until demand he was referring to contractual and not to criminal liability. The effect of the holding below is that regardless of the contractual rights a person may have to deal with property in his custody he can be criminally responsible for exercising those rights.

This Court therefore ought to settle the issue of

when there is a conversion of fungible grain, before or after demand.

## III

### There Is a Conflict Among the Circuit Courts of Appeals As to the Criminal Effect of Statements Concerning Future Acts Which Later Turn Out to be False.

In *Chaplin v. United States*, C. A., D. C. 157 F. (2d.) 697, the indictment charged defendant and his wife with intent to defraud by repersenting that if one McMullen would advance money, they *would* purchase liquor stamps and *would* return the money. The Court construed the indictment to mean that the government's case was founded on the defendant's intention not to do two things promised, (1) buy stamps, and (2) repay money which related to future acts. The question decided was whether the "present intention" related to "present or past existing fact." The Court held that a promise to do something in the future was not a violation of the statute (which prohibited obtaining money or goods under false pretenses with intent to defraud).

Contra to the *Chaplin* case are: *U. S. v. Rubenstein*, 2 Cir. 166 F. (2d.) 249, where Rubenstein was indicted for knowingly making false statements to his draft board regarding his liability for military service. The Court held that the statute (Selective Training and Service Act of 1940) covered promises relating to future acts.

*United States v. Grayson*, 2 Cir., 166 F. (2d) 863, where the defendant was convicted of mail fraud for representations relating to the return customers might

expect in the future. The Court there refused to follow *Chaplin*.

*Todorow, et al. v. United States*, 9 Cir. 173 F. (2d.) 439, where the defendants were convicted for causing a veteran to make false and fraudulent statements and representations in connection with the veteran's purchase of surplus property. The statements related to what the veteran would do. The convictions were under 18 U. S. C. 1001. See also *McCoy v. United States*, 169 F. (2d.) 776, from the Ninth Circuit.

*United States v. Lurie*, 7 Cir. 222 F. (2d.) 11, where the defendants were convicted of conspiracy to defraud and with having veterans file false certificates apparently relating to what they would do with the property.

*Reass v. United States*, 4 Cir., 99 F. (2d.) 752, where the false statement was to the effect that all deeds and mortgages presented with the statement were first liens when in fact they were not.

While the *Chaplin* case stands alone, there is nevertheless a conflict which should be settled by this Court, particularly in view of the fact that cases such as the *Reass* case obviously involved statements containing false statements were false at the time the statements were made.

It is of particular importance that this matter be settled, because it precludes a person from later changing his mind without subjecting himself to criminal prosecution. The least that should be required would be clear, strong and cognizant proof of what the present intention was at the time of the making of the

alleged false statement if false statements are to include future acts.

## IV

**Where Admitted Technical Errors Are Made in the Trial Judge's Charge Upon An Indictment Containing 30 Counts, Including One of Conspiracy, it Behoves This Court, in the Interest of American Justice, to Review the Same When a Person's Right to Liberty Is at Stake.**

The trial Court charged the jury as follows (R. 363):

> "Wheat, *rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact.*" (Emphasis added).

The emphasized portion of this charge was taken from this Court's opinion in *U. S. v. Morrisette*, 342 U. S. 246, 271-272, 96 L. Ed. 288, 72 S. Ct. 240.

It was undisputed that the petitioner had a right to commingle the grain and the Court charged that intent was necessary to support a conviction. In effect he charged that no intent was necessary and that intent was necessary.

The trial Court also charged the jury that petitioner was guilty whether or not the wheat so taken was replaced or not replaced by any one of any type or grade (R. 364) and refused to charge that the jury could consider the return of the wheat on the issue of intent.

Petitioner preserved his exceptions to the charge as given and claimed error on appeal. The Court below held the charges as given were only technical errors and did not mislead the jury. (App. 29, 30).

Petitioner was tried under 30 counts including one of conspiracy. The trial consumed five days. The typewritten transcript is 809 pages long and the printed appendix is 403 pages long. The government introduced 65 exhibits, some of which were voluminous. The simple fact of the length of testimony and number of exhibits without regard to the purpose of their introduction was quite a burden on petitioner. Even the trial Judge was aware of the gravity of the charge of conspiracy and the burden required to meet it, when he said:

> "Well, conspiracy is—they have almost held that if you just indict a man for conspiracy you have got enough evidence to go to the jury." (R. 344).

This Court itself recognizes the wide-sweeping nets of conspiracy prosecutions. *Grunervald v. U. S.*, 353 U. S. 391, 1 L. Ed. (2d) 935, 77 S. Ct. 963.

Where a man is subjected to such a proceeding where his liberty is at stake, it is difficult to see how the errors of the charge could not have influenced the jury and it certainly behoves this Court, as the highest Court in the land, to make sure that such errors are not allowed to deprive a man of his freedom. For that reason, petitioner asks this Court to issue its writ of certiorari so that his rights may be protected.

## V

**The Court Below, as Evidenced by Its Opinion, Misunderstood the Evidence and Assumed Facts Not Proved By the Government.**

The Court below held that the technical errors in the trial Judge's charge were not prejudicial and could not have influenced the jury, yet the Court itself was influenced by facts which were not in issue at the trial. On two separate occasions the Court below refers to a storage of grain in Eastern Carolina which occurred in 1955 (App. 25, 31).

The conversion counts in the indictment concerned specific dates between May 25, 1954 and June 22, 1954. The trial Judge instructed the jury that the shortage of 1955 could not be considered by them as evidence against the petitioner (R. 331). This demonstrated that the Court below was influenced by the shortage which was not an issue or evidence in the trial court. While the Court below was obviously influenced by the shortage in 1955 it concluded that the jury was not misled by the errors in the charge. If the Court could be influenced by something which was not in evidence it is difficult to agree with them that the jury was not misled by erroneous charges. The Court did exactly what it said the jury could not have done.

The Court below was also mistaken as to facts in other respects. In discussing Count 31 the Court states that the 4200 bushels of wheat purchased from the C. C. C. in Calhoun County, South Carolina, was sold and delivered to a mill in North Carolina. (App.

(3). The Government sought to prove this by Rufus Anderson, a truck driver, who hauled the wheat from

Calhoun County to Eastern Carolina. Anderson stated that he did not know whether he hauled the Calhoun County wheat to North Carolina or not. (R. 190). He did haul wheat to North Carolina but not Calhoun wheat.

In the trial Court and on appeal it was petitioner's contention that petitioner filled out the Farmers' Purchase Orders correctly under the circumstances. The Court below stated in its opinion that in "no case did the purchase order show that the farmer did not receive the amount of straight grain called for by the purchase order but mixed grain of which straight grain formed only a part": (App. 39). The proof in the case did not show that the farmer did not receive the amount of straight grain called for in the purchase order.

The Farmer's Purchase Order provided that the holder was entitled to so many hundredweights of straight grain or mixed feed. The physical order itself had three columns which were to be completed according to the amount of grain sold and delivered, whether straight grain or straight grain mixed in feed. If only straight grain was sold and delivered the first column was to be filled in. If the amount of hundredweights was in mixed feed containing at least 75 per cent of straight grain, the second column was to be filled in. If the amount of hundredweights was in mixed feed containing at least 60 per cent of straight grain, the third column was to be filled in. If petitioner sold and delivered the amount of hundredweights called for in straight grain and this straight grain was mixed into feed there was no place on the order where this could be shown other than in the first column. This is exactly what the petitioner did.

The Court below overlooked this and thought that the petitioner obtained dealers certificates of a greater value than he was otherwise entitled to. One of the Government's witnesses testified that this action by the petitioner was proper. (R. 168). The Court below dismissed this by saying that there was a conflict in evidence. The petitioner contends and respectfully submits that the evidence shows that each farmer received the actual amount of straight grain to which he was entitled or at least that the Government did not prove that the farmers did not so receive it.

This apparent misunderstanding by the Court below, coupled by what has previously been said should provide this Court with ample reason to grant a writ of certiorari.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this Court issue its Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted.

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# APPENDIX

## OPINION BELOW,

(Argued April 6, 1959 Decided May 28, 1959)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

John L. Nettles and James P. Mozingo, III, for Appellant, and Arthur G. Howe, Assistant United States Attorney, (N. Welch Morrisette, Jr., United States Attorney, on brief) for Appellee.

SOPER, Circuit Judge:

This appeal is taken from a judgment of the District Court whereby the defendant, Francis M. Elmore, was sentenced to a term of 18 months imprisonment after a verdict of guilty on certain counts in an indictment of thirty counts, wherein he was charged with violating certain criminal provisions of the Commodity Credit Corporation Act passed for the protection of the operations of the Commodity Credit Corporation in the distribution of farm commodities and farm products in the relief of disaster areas found to exist by the President of the United States.

The indictment outlines the statutory provisions and executive orders under which the relief of major disasters in the United States was made available. A chain of authority was established, running from the President through the Federal Civil Defense Administrator and the Secretary of Agriculture, whereby the existence of a major disaster should be determined,

and the distribution of feed for livestock to farmers, ranchers and stockmen should be authorized. The Farmers Home Administration was charged with the responsibility for determining the eligibility of applicants for emergency livestock feed, and the Commodity Credit Corporation was authorized to make available any farm commodity or product thereof and to issue regulations establishing the procedure under which applicants could receive surplus feed grains or approved mixed feed owned or controlled by it. See 42 U. S. C. 1855-1855g, 18 F. R. 407, 18 F. R. 4609, 12 U. S. C. 114a-2(d), 7 U. S. C. 1427, 19 F. R. 5199-5201, 5466-5468.

Under these authorities and regulations it was necessary for an applicant for assistance first to make application to his County Committee of the Farmers Home Administration and upon approval of his application, his County Agricultural Stabilization and Conservation Committee issued a Farmers' Purchase Order for Grain for Livestock Feed, which the applicant could present to a dealer in grain who, upon acceptance, was required to complete a table on the order form showing the quantities of surplus feed grains, or approved mixed feeds, delivered to the applicant. The dealer was also required to certify on the Purchase Order form that he had sold and delivered to the named farmer the grain or mixed feed shown on the table. After the acceptance of the Purchase Order and delivery of the grain, in accordance with the certificate, the dealer could present the Purchase Order within one hundred twenty (120) days to the County Agricultural Stabilization and Conservation Committee and receive in exchange a negotiable certificate which the Commodity Credit Corporation would accept at face value if pre-

sented within one hundred twenty (120) days after issuance. In conformity with this procedure the President of the United States, on September 16, 1954, determined that a major disaster existed in South Carolina and, on September 22, 1954, the Secretary of Agriculture determined that all the counties in the State were affected by the disaster.

The first count of the indictment charged that thereafter, on November 26, 1954, the defendant for the purpose of influencing the action of the Commodity Credit Corporation and obtaining something of value from the Corporation unlawfully made false statements and representations on a Farmer's Purchase Order for grain and livestock feed, knowing the statements and representations to be false, in that the defendant unlawfully certified on a Purchase Order issued to a certain Mack McKenzie, that Elmore Milling Company had delivered 25 cwt. of surplus feed grain to McKenzie, when in truth the grain had not been so delivered. This count of the indictment was based on 15 U. S. C. §714m(a), which provides that whoever makes any statement knowing it to be false for the purpose of influencing the action of the Commodity Credit Corporation, under the provisions of the Commodity Credit Corporation Act, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than five years or both. Counts 2 to 11 of the indictment charged similar offenses on various dates in 1954 and 1955. The defendant was found guilty on counts 1, 2, 6, 7, 9 and 11 and acquitted on the rest of the counts in this category.

Counts 12 to 28 of the indictment charged that the defendant on various dates between May 25 and June 22, 1954, did wilfully steal, remove, dispose of and con-

vert to his own use or to the use of the Elmore Milling Company, a copartnership, various quantities of wheat of the Commodity Credit Corporation then in storage at South Carolina State Warehouse No. 1227-G of the Eastern Farmers Cooperative Association. These counts were based on 15 U. S. C. §714m(c), which makes such actions punishable by a fine of not more than $10,000 or imprisonment for not more than five years or both. The defendant was found guilty on all of the counts in this category.

Count 31 of the indictment charged that the defendant, on July 13, 1954, for the purpose of obtaining 4200 bushels of wheat at a discount price made false statements, knowing them to be false, in a wheat certificate submitted by him on behalf of Elmore Milling Company to the Commodity Credit Corporation in that he certified that the wheat would be used for livestock and poultry feed and that a similar certificate would be obtained from subsequent buyers in the event the wheat was resold. This count was based on 15 U. S. C. §714m(a). The defendant was convicted on this count.

County 32 of the indictment charged that Francis M. Elmore, the defendant named in the foregoing counts, and Thomas H. Elmore conspired to violate 15 U. S. C. §714m(d) in that the defendants for the purpose of influencing the action of the Commodity Credit Corporation and obtaining for themselves or Elmore Milling Company something of value, did knowingly make false statements to the Corporation, to the effect that wheat purchased by them from the Corporation would be used as feed for livestock or poultry and that if the wheat were sold a similar certificate would be obtained from the purchaser. Both defendants were

convicted on this count; but Thomas H. Elmore was released on probation and has not appealed.

Certain facts are not in dispute. Francis M. Elmore, the defendant-appellant, was the manager of a State-operated grain storage warehouse in Florence, South Carolina, owned by the Eastern Carolina Farmers Cooperative Association. He was also the manager of the Elmore Milling Company, a partnership consisting of his wife and sister, which dealt in feed. Thomas Elmore, his brother, the co-defendant in the conspiracy count, was engaged in the trucking business as manager for one James Poplin during May, June and July, 1954, hauling grain and other merchandise.

The warehouse in the ordinary course of business issued warehouse receipts to the owners of the grain on storage from which it kept a daily record or inventory showing the amount of grain in the warehouse. Owners were required to produce the receipts for cancellation upon withdrawal. During the years 1953 and 1954 the Commodity Credit Corporation stored grain in the warehouse under agreements with the Cooperative Association, executed by the defendant as manager, which provided that the warehouse would receive for storage grain of the C. C. C. to be commingled with other grain and that the Association would at all times maintain in the warehouse a stock of grain equal in quantity and quality to the grain which it was obliged to deliver under its outstanding warehouse receipts. The agreements further provided that the warehouse would deliver grain belonging to the C. C. C. as it directed, upon the surrender of the receipts, and that the warehouse would pay the difference between the value of the commingled grain loaded out and the grain called for in the loading orders.

In 1955 the C. C. C. forwarded orders to the warehouse for delivery of wheat and after partial delivery, lacking 12,220 bushels, had been made, the warehouse was found to be empty. This led to an investigation and disclosed information upon which counts 12 to 28 of the indictment, now to be considered, were based. The loss to the Government was made up by assessing the farmers who owned the Cooperative Association.

The investigation covered the period from June, 1951, when operations of the storage warehouse began, to May, 1955. Calculations based on the records of receipts and disbursements showed that on May 25, 1954, the amount of grain on storage was 4,051,629 pounds. An examination of the outstanding warehouse receipts as of this date showed that the C. C. C. was the owner or pledgee of 4,756,441 pounds of grain, or 704,812 more pounds than were in the warehouse at the time. During the period from May 25, 1954, to June 22, 1954, the transactions occurred which formed the basis of counts 12 to 28 of the indictment. The defendant caused seventeen shipments of grain in varying amounts, totaling 933,596 pounds or 15,559.93 bushels, to be withdrawn from the warehouse and sold in the name of Elmore Milling Company to various flour mills in South Carolina. The purchasers made payment therefor to the milling company and their checks were deposited to its credit in its banking account. These withdrawals were made without the production of warehouse receipts for cancellation contrary to the agreements between the C. C. C. and the Cooperative Association and contrary to the official regulations governing the State warehouse system. Accordingly, the withdrawals did not show on the daily inventory of the warehouse. Separate records of these

withdrawals were, however, made by the Secretary of the Association, contrary to the usual procedure, upon the instruction of the defendant.

Shortly after the withdrawals began and payments for the grain were made by the purchasers to the Elmore Milling Company, the defendant began to purchase wheat to take the place of that which he had withdrawn. In June, 1954, he purchased from farmers three loads of grain in the aggregate amount of 5325.24 bushels at $2.00 per bushel. In the same month he purchased at a discount from the C.C.C. in the name of Elmore Milling Company 18,000 bushels of wheat at $1.67 per bushel which the C. C. C. desired to dispose of as surplus wheat, to be used, however, only for livestock and poultry feed.

The defendant testified that the purpose of these transactions was to earn a profit for the warehouse and that this purpose was achieved. According to his testimony an average profit of 12-cents a bushel was made on the withdrawal of the grain from the warehouse and the replacement of grain purchased from farmers, and a profit of $2673.80 was made on the 18,000 bushels of grain purchased from the C. C. C., and all of the profit on the farmers' grain was turned over to the warehouse while the profit on the C. C. C. was divided—one-third to the warehouse and two-thirds to himself. He admitted that the withdrawals were contrary to the regulations but said they were made with the approval of the president of the Association, who was dead at the time of the trial. Testimony on the part of the Government, on the other hand, tended strongly to show that none of the profit came into the hands of the Cooperative but that all of it went

to him or the Elmore Milling Company in which he was interested. The money derived from the sale of the grain was traced to the bank account of the milling company and, according to the secretary-bookkeeper of the warehouse, no profit was made by it or recorded on its books. Indeed it was shown that the standard warehouse charges for services rendered in the withdrawal and deposited grain were not paid. Furthermore, from the fact that the C. C. C. grain was purchased at a discount, the jury might fairly have inferred that the profits derived from its sale were greater than the defendant testified.

The principal contention of the defendant with regard to counts 12 to 28 of the indictment is directed to the judge's charge as to the meaning of the statute set forth in 15 U. S. C. §714m, which makes it a criminal offense for anyone to wilfully steal or convert to his use or that of another any property owned or pledged to the Commodity Credit Corporation. In effect, the judge charged the jury that the word "steal" as used in the statute is not confined to the technical crime of common larceny but includes all felonious taking of wheat with intent to deprive the owner of possession and the rights and benefits of ownership.

The judge also charged the jury that conversion may be consummated where the initial possession of the converter is entirely lawful and that wheat rightfully taken into one's custody may be converted without any intent to keep or embezzle merely by commingling it with the custodian's own, if he is under a duty to keep it separate and intact. However, the judge went on to say that in enacting the statute Congress did not intend to eliminate intent from the offense; that in order to violate the statute there must have been an intent

to violate the law; and that where the taking is open and there is no attempt to conceal, a strong presumption arises that there is no felonious intent, which presumption must be repelled by clear and convincing evidence before a conviction is authorized and, therefore, the question of what the defendant intended in this case by his actions was a question of fact to be determined by the jury under all the facts and circumstances of the case.

The judge further charged that if the jury found that wheat belonging to the Commodity Credit Corporation was removed from the warehouse by the defendant without authority and with intent to convert it either temporarily or permanently to his use or to that of the Cooperative Association, then the defendant was guilty under counts 12 to 28, whether or not a profit was made either for him, the Elmore Milling Company, or the warehouse, and whether or not the wheat taken out of the warehouse was replaced.

The specific objections which the defendant makes to this charge are:

(1) Since the commingling of the wheat in the warehouse was entirely lawful it was irrelevant to charge the jury that wheat rightfully taken into custody may be converted without any intent to keep or embezzle it by commingling it with the custodian's own if he was under a duty to keep it separate and distinct;

(2) The jury were likely to be confused by the statements that an intent to keep or embezzle under such circumstances is immaterial, followed by the statement that a criminal intent to violate the

law was necessary to conviction in the pending case;

(3) The statement that it was immaterial whether or not the wheat taken out was replaced or not replaced was harmful and should have been coupled with the affirmative statement, requested by the defendant, that the jury had the right to consider the return of the property in connection with the question of intent.

We do not think that the defendant was prejudiced by the statements contained in the charge in the setting under which it was delivered. The broad scope given to the word "steal," was a correct interpretation and was in harmony with the ruling in *United States v. Turley*, 352 U. S. 407, that the word "stolen" has no accepted common law meaning and as used in the National Motor Vehicles Act is not limited to takings which amount to larceny but includes all takings with criminal intent to deprive the owner of the rights and benefits of ownership. The definition of "conversion" in the charge was likewise correct. It was taken almost literally from *United States v. Morissette*, 342 U. S. 246, 271-2, where it was held, notwithstanding the breadth of meaning to be given to the term, that a criminal intent is an essential element of the offense of converting public property to one's own use in violation of 18 U. S. C. §641.

The reference in the charge to a possible offense by the commingling of grain with the custodian's own without an intent to embezzle, if it was the duty of the custodian to keep the deposits separate, could have done the defendant no harm because it was made perfectly clear to the jury that in this case the grain was

properly commingled and that the obligation of the warehouse was fulfilled if it produced upon demand grain of the same kind and quality as that deposited by the owner. Nor could the jury possibly have inferred, in view of the positive statements in the charge, that they were at liberty to convict the defendant even if he had no wrongful intent. The technical objections now raised by the defendant are especially lacking in weight and substance, in view of the undisputed evidence and the admissions of the defendant, which clearly establish the fact that he made use of the Corporation's grain in order that he might make a profit for himself and for the warehouse that he managed. It was therefore proved beyond any reasonable doubt not only that the defendant withdrew the wheat illegally and in breach of contract without the production of warehouse receipts, but also that he withdrew it with the specific intent to appropriate it to his own use and benefit. Under these circumstances it becomes the duty of the court to ignore technical objections to portions of the charge that could in no way have interfered with the jury in arriving at their verdict. 28 U. S. C. §2111; Rule 52(a), Fed. Rules of Crim. Procedure, 18 U. S. C.; *Kotteakos v. United States*, 328 U. S. 750, 757-61; *Pezzuola v. United States*, 1 Cir. 232 F. 2d. 907, 915, cert. den. 352 U. S. 834.

These observations go far to dispose of the sweeping contention that the judge should have directed a verdict for the defendant on counts 12 to 28 because, in the absence of an intention to convert, there can be no conversion of fungible grain by its lawful custodian where he is able to produce it on demand. In support of this contention it is said that there was a total lack of any evidence of an intent on the part of

the defendant to convert to his own use. It must be borne in mind that the charge against the defendant in the present case is not based on his ability or failure to produce on demand the grain for which the C. C. C. held warehouse receipts, although the evidence does show that such a failure took place in 1955. The present case is based on the charge that the defendant, having lawful custody of the grain, made use of it as if it were his own and the charge was sustained by proof that he actually withdrew grain of the C. C. C. without the production of warehouse receipts, sold it at a profit and replaced it with grain which he had bought from the C. C. C. at a discount, for restricted use, and sold without restriction in violation of his contract with the Corporation. We are at a loss to understand, in view of these facts, the contention that there was no evidence that the defendant intended to convert the wheat, unless it is meant that it was his intention to replace it after he had used it for his own purposes. But neither the intention to replace nor the actual replacement is a defense when conversion is proved.[1] The criminal sanction of the statute is imposed to prohibit the unlawful use of another's property, and the statute does not permit the converter to subject the owner to the risk of loss and relieve the converter of criminal liability if his operations are successful and he makes restitution.

In *Hartford Accident Ind. Co. v. State of Kansas*, 10 Cir., 247 F. 2d. 315, upon which the defendant relies, the court was concerned with the contractual obligations owed by the custodian to the owner of wheat, and

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[1] *Rakes v. United States*, 4 Cir., 169 F. 2d. 739, 743; *Dobbins v. United States*, D. C., C. A., 157 F. 2d. 257, 259, cert. den. 329 U. S. 257; *Hancey v. United States*, 10 Cir., 108 F. 2d. 835, 837.

in saying (page 321) that there can be no conversion until demand for delivery has been dishonored, the court was referring to contractual and not to criminal liability. We need not here inquire into the correctness of this decision. See Harper & James, Law of Torts, §§2.17, 2.27; 56 Am. Jur., Warehouses, §191. The more pertinent cases in which the courts found criminal conversion of property to exist under varying circumstances in violation of the statute now under consideration are *Dawson v. United States*, 5 Cir., 203 F. 2d. 201; *Shannon v. United States*, 5 Cir., 209 F. 2d. 835; *Henderson v. United States*, 5 Cir., 203 F. 2d. 81; *Marteney v. United States*, 10 Cir., 218 F. 2d. 258.

COUNTS 29, 30, 31 and 32

These counts of the indictment were based on activities of the appellant-defendant, Francis M. Elmore, and his brother, Thomas H. Elmore, in the acquisition of surplus feed wheat from the C. C. C. and the execution of various certificates as to its intended use. The first incident occurred with respect to the purchase of 18,000 bushels from the C. C. C. above mentioned, which were used in part to replace the wheat illegally withdrawn from the warehouse. On June 15, 1954, an employee of the Department of Agriculture informed Francis Elmore that the C. C. C. had 12,000 bushels of No. 4 wheat and 6000 bushels of No. 5 wheat at Darlington, South Carolina, which it desired to sell at a minimum of $1.61 per bushel on a restricted basis in order to create more storage space. The restriction was that the wheat could be used only as feed for livestock or poultry. Shortly thereafter Thomas H. Elmore, the defendant's brother, submitted a written bid on behalf of Elmore Milling Company of $1.67 per bushel, which

was accepted. In order to secure the wheat he executed two certificates signed by him in the name of the milling company to the effect that the wheat would be used only as feed for livestock or poultry and that if it were sold to another person a similar certificate as to its use would be obtained. The certificate also stated that the signer understood that the price charged was based on restricted use and that its use otherwise would impair the Government price support programs, and that if the signer permitted any other use of the commodity he would pay the C. C. C. a price adjustment of $1.07 per bushel on the 12,000 bushels and $1.04 per bushel on the 6000 bushels. Notwithstanding these promises, the wheat was hauled to the Cooperative warehouse and commingled with the wheat on storage and disposed of, under the direction of Francis M. Elmore, without restriction as to its use. Because of the false certificates given in these transactions Thomas H. Elmore was indicted in counts 29 and 30 for violation of 15 U. S. C. §714m(a). Thomas Elmore's defense was that he had learned of the availability of this wheat from another representative of the Government when he called to see him in connection with the hauling business and that he made the bid and bought the wheat in the name of Elmore Milling Company without his brother's knowledge and had it hauled to the warehouse and that he signed the certificates without reading them. The jury convicted Thomas H. Elmore on these two counts.

Count 31 of the indictment charges a similar violation of §714m(a) by Francis M. Elmore with respect to the purchase of 4200 bushels of Government wheat at $1.75 per bushel on July 13, 1954, upon a similar restriction and the execution of a similar certificate by

him. This wheat was held by the Government in storage on farms in Calhoun County, South Carolina, and the evidence indicates that after the purchase he sold and delivered it without restriction at $2.25 per bushel to the Statesvillee Flour Mills Company at Statesville, North Carolina.

The defendant's statements in respect to this transaction were conflicting. At one time, in statements to Government representatives, he corroborated the above account, but afterwards he testified that he sold the wheat to one James M. Poplin, who was in the milling business and trucking business and employed [redacted] as H. Elmore in the latter, and that Poplin gave him a certificate of restricted use which was later lost in a fire. Poplin was a witness for the Government in respect to the Darlington wheat but he was not questioned by the defendant as to the purchase of Calhoun County wheat. Obviously there was sufficient evidence to justify the submission of this charge to the jury and they found a verdict against the defendant.

The defendant contends, notwithstanding the conflict in the evidence, that the jury should have been instructed to find a verdict for him on count 31 on the ground that the crime of making a false statement for the purpose of influencing in any way the action of the Corporation or for the purpose of obtaining for himself or another money, property or anything of value is confined to false statements of existing fact. Since the statetments by the defendant in regard to the 4200 bushels of wheat purchased by him from the C. C. C. on July 13, 1954, were not statements of fact but promises as to the future use of the commodity, it is said that he committed no crime. The argument is based on the decision in *Chaplin v. United States*, C. A., D. C.,

157 F. 2d 697,[2] that under the statutory crime of obtaining money or things of value by false pretenses the statements must relate to existing facts and not to future transactions, the theory being that otherwise there would be danger that debtors unable to meet their obligations would be prosecuted for the commission of crime. It is said that if Congress had intended to make false promises as to the future a criminal offense under 15 U. S. C. §714m(a), it would have made express provision therefor as it did in 18 U. S. C. §1341; which makes it a crime to use the United States mails for the purpose of executing a scheme to obtain money or property by false or fraudulent pretenses, representations or promises.

In our opinion the statute, 15 U. S. C. §714m(a), should be intempreted to mean not only false statements of existing fact but also false and fraudulent promises which the maker does not intend to perform. It was the stated purpose of the Commodity Credit Corporation Charter Act, 15 U. S. C. §§714-714(o), to Stabilize and support farm income and prices and the Corporation was given specific powers to support the prices of agricultural commodities by loans and purchases and also to dispose of surplus agricultural commodities. The criminal offenses defined in §714m were evidently designed to protect the Corporation in the performance of its duty. In the exercise of its authority, it was necessary for the Corporation to impose restrictions upon the use of the surplus commodities and to receive assurances from dealers through whom the commodities were disposed of that the distribution would be made in such a way as not to frustrate the purposes of the plan. Bearing

[2] See the discussion of this case in 168 A. L. R. 333.

these circumstances in mind it cannot be supposed that Congress intended to direct the criminal sanctions of the act only against those who make false statements of existing fact and to exculpate those who should obtain surplus commodities by making false promises which they do not intend to fulfill. In practical effect, a false promise fraudulently given amounts to a false statement of an existing intent and it can be as destructive as the false statement of a material fact. We think that Congress intended to cover it by the statute.

Similar situations have been met in the execution of other federal statutes and similar interpretations have been made. Thus, it was held in *United States v. Rubinstein*, 2 Cir., 166 F. 2d 249, that it was an offense under the Selective Training and Service Act of 1940 for a draftee to make false statements as to his liability for service even if the statements were merely expressions of opinion as to future matters if belief in their truth were not honestly entertained. The court pointed out (page 255) that the statements were to be used to enable men to be selected for military service with regards to the needs of their dependents, employers and the public and that in order to enable the Government to perform a task of this magnitude, Congress made it a crime to furnish false statements to the draft boards, whether they pertained to the past, present or future.

Similarly in *United States v. Kreidler*, D. C., S. D. Iowa, 11 F. Supp. 402, it was held to be a criminal offense under the Home Owners' Loan Corporation Act, 12 U. S. C. §1467(a), to make a false statement to influence the actions of the Home Owners' Loan Corporation, whether the statement was merely prom-

issory or a statement of existing fact. In *Todorow, et al. v. United States*, 9 Cir., 173 F. 2d 439, cert. den. 337 U. S. 925, it was held that the false statement of a veteran in an application to purchase surplus army trucks as to the future use of the trucks were violations of the False Claims Act, 18 U. S. C. §1001, which makes it a crime for anyone in a matter in the jurisdiction of any agency of the United States to make any false, fictitious or fraudulent statement. The same rule was followed in *Corcoran v. United States*, 5 Cir., 229 F. 2d 295, 299, cert. den. 352 U. S. 824; *United States v. Grayson*, 2 Cir., 166 F. 2d 863, 866. See also *McCoy v. United States*, 9 Cir., 169 F. 2d 776; *United States v. Lurie*, 7 Cir. 222 F. 2d 11.

Count 32 of the indictment charged that Francis M. Elmore and Thomas H. Elmore violated §714m(d) by conspiring with one another to violate §714m(a) by making false statements in the feed certificates presented to the C. C. C. that the wheat purchased by them from the Corporation would be used as feed for livestock and poultry knowing that the statements were false. The evidence in support of counts 29 and 30 with respect to the bid and certificates by Thomas H. Elmore in the purchase of the 18,000 bushels of wheat from C. C. C. and the delivery of this wheat to the Cooperative warehouse, and the sale of it in the name of the Elmore Milling Company by Francis M. Elmore, was sufficient to justify the jury's verdict of guilty on count 32.

## COUNTS 1 to 11

These counts charge that the defendant engaged in certain illegal acts in violation of 15 U. S. C.

§714m(a) which were at variance with the emergency feed program set up in 1954 by the Government for the relief of livestock farmers who were injured by the drought of that year. For that purpose the C. C. C. undertook to dispose of surplus grain held by it to farmers without disturbing the market. Under the procedure, which is outlined above in describing the counts now under consideration, a farmer could obtain free of charge a Purchase Order enabling him to purchase a designated number of cwt. of grain, which must consist wholly of surplus feed grain comprising wheat, oats, barley or grain sorghums, or a mixture thereof with other feed. A mixture was required to contain not less than 75 per cent of eligible straight grains or not less than 60 per cent of eligible straight grains. The value of the Purchase Order was the number of cwt. called for by the order expressed in dollars; but if the 75 per cent or 60 per cent mixture was delivered the value of the order in dollars was 75 per cent or 60 per cent of the number of cwt. respectively. The farmer could use this order in the purchase of surplus or mixed grain from a dealer. When this was done the dealer was required to enter on the order the amount and character of the commodities delivered to the farmer, showing the number of cwt. of surplus straight grain and of mixed feed, and he and the farmer were required to sign and certify to the entries. The dealer in turn could deliver the certified order to the office issuing it and receive a negotiable dealer's certificate which expressed a dollar value based on the actual amount of *straight grain* delivered to the farmers as certified on the purchase order. The dealer's certificate was transferable at its face value and was accepted at this value for the

purchase from the C. C. C. of available surplus feed commodities.

Evidence was offered as to each of the 11 counts and the jury found the defendant guilty on counts 1, 2, 6, 7, 9 and 11 and not guilty as to the rest. As to each of the 6 counts the Government produced a Farmer's Purchase Order issued in October, November or December, 1954, upon which the defendant had certified that he had sold and delivered to the farmer the full amount of straight grain wheat designated on the order. In no case did the purchase order show that the farmer did not receive the amount of straight grain called for by the purchase order but mixed grain of which straight grain formed only a part. Accordingly, the defendant was able to obtain dealer certificates ranging in value from $8.00 to $307.00, each of which was of greater value than that to which he was entitled. In each instance he negotiated the dealer's certificate and received the designated cash value. The evidence also shows that the defendant attended a conference at Columbia, South Carolina, on September 30, 1954, and received instructions as to the proper method of completing purchase orders. He also applied for and received a purchase order as a farmer for 61 cwt. of grain and used it to buy 101.75 cwt. of mixed feed containing 61 cwt. of straight grain. It is obvious that there was substantial evidence to support the convictions.

In general, the defense to counts 1 to 11 was that the Government's evidence was insufficient to prove that the farmers did not actually receive the amount of straight grain called for by the orders. The defendant testified that he was instructed by the Government officials that he could put the amount of straight

grain called for by the certificates into a mixture of straight grain and mixed feed and that each of the farmers named in the first 11 counts got all the straight grain which his purchase order called for, mixed with other grain, and that the defendant did not show this fact on the purchase orders as he did not understand that it was necessary to do so. He therefore asserted that he did not actually defraud the Government and had no intention to do so. The conflict of evidence caused by this defense was submitted to the jury, who found against the defendant. No motion was made by the defendant for a directed verdict.

*Affirmed.*